85-1000

No. _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1985

FACER INSURANCE AGENCY, INC.,

Petitioner,

v.

GEORGE FABE, Superintendent of Insurance, State of Ohio Columbus, Ohio, Liquidator of Proprietors' Insurance Company (an Ohio Corporation), 7991 Columbus Pike, Delaware, Ohio 43014,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Ill. Rev. Stat., Ch. 73, Par. 818 as amended in 1967, imposes or creates a new substantive liability on the part of an insurance agent in the event of the insolvency of the insurer.

2. Whether the liquidator of an insolvent insurer can require an agent to pay unearned or uncollected premiums which neither the insurer or the agent have any authority or right, in law, to collect from the policyholder.

PARTIES TO THE PROCEEDINGS

The petitioner is Facer Insurance Agency, Inc., a Delaware corporation, having no corporate parent, subsidiary or affiliate.

The respondent is George Fabe, Superintendent of Insurance, State of Ohio, Columbus, Ohio, Liquidator of Proprietors' Insurance Company (an Ohio Corporation).

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GEORGE FABE, Superintendent of Insurance, State of Ohio Columbus, Ohio, Liquidator of Proprietors' Insurance Company (an Ohio Corporation), 7991 Columbus Pike, Delaware, Ohio 430134,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Seventh Circuit entered in this proceeding on September 9, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet officially reported.

The judgment of the District Court for the Central District of Illinois entered July 20, 1984 is reported at 588 F. Supp. 1330 (C.D. Ill. 1984).

Both the judgment of the District Court and the opinion of the Court of Appeals are included in the Appendix.

JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. § 1254 (1) for review by certiorari of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. A written opinion was issued by that Court on September 9, 1985.

RELEVANT STATUTES

Illinois Revised Statutes, Chapter 73, Section 818 (Prior to 1967 Amendment)

In all cases of mutual debts or mutual credits between the company and another person, such credits and debts shall be set off and the balance only shall be allowed or paid, provided, however, that no set-off shall be allowed in favor of any person where:

(a) the obligation of the company to such person was purchased by or transferred to such person with a view of its being used as a set-off, or

(b) the obligation of such person is to pay an assessment levied against the members or subscribers of any company which issued assessable policies, or to pay a balance upon a subscription to the shares of a stock company. (Effective 1937)

1967 Illinois Revised Statutes, Chapter 73, Section 818

Set-offs or Counterclaims. In all cases of mutual debts or mutual credits between the company and another person, such credits and debts shall be set off or counterclaimed and the balance only shall be allowed or paid, provided, however, that no set-off or counterclaim shall be allowed in favor of any person where:

(a) the obligation of the company to such person was purchased by or transferred to such person with a view of its being used as a set-off or counterclaim, or

(b) the obligation of such person is to pay an assessment levied against the members or subscribers of any company which issued assessable policies, or to pay a balance upon a subscription to the shares of a stock company.

No set-off shall be allowed in favor of an insurance agent or broker against his account with the company for the unearned portion of the premium on any cancelled policy, unless that policy was cancelled prior to the entry of the Order of Liquidation or Rehabilitation, and unless the unearned portion of the premium on that cancelled policy was refunded or credited to the assured or his representative prior to the entry of the Order of Liquidation or Rehabilitation. (Amended by Laws 1967, p. 789, eff. July 1, 1967).

STATEMENT OF THE CASE

Proprietors' Insurance Company (PIC), an Ohio Corporation, with its principal place of business in Ohio, was, until 1981, in the business of insuring aviation risks, among others. In January, 1980, PIC entered into an Agency Agreement with the Facer Insurance Agency, Inc. (Facer). This agreement, prepared by PIC, was executed and performed in Illinois.

As they apply to this case, the pertinent parts of the Agency Agreement are that:

> (T)he agent may collect, receive, and receipt premiums on insurance proposals tendered to and accepted by the Company, and may hold such premiums as a trustee, separate and apart from all the other moneys belonging to the Agent and retain out of premiums so collected, as full compensation for business placed with the company, commissions . . . .
>
> The Agent's account on the Company's books evidencing a debtor-creditor account is deemed merely a record of business transacted. Neither the keeping of an account in such form, nor the rendering of same, nor failure

> to enforce prompt remittance, nor alteration in compensation rate, nor compromise or settlement shall be considered waiver of the trust relationship as to premiums collected by the Agent . . . .
>
> Money due the Company on business placed by the Agent with the Company shall be paid in full no later than forty-five (45) days following the end of the month in which policies become effective.
>
> If the Company shall return or refund to any insured the whole or any part of premiums from which the Agent shall promptly repay to such insured the same proportionate part of retained commissions and/or charges.
>
> After issuance by the Company of any contract of insurance directly to an insured, the Agent shall be liable to the Company for the earned premium on each policy or binder of insurance solicited and written through the Agent, whether the same shall have been collected or not.

Pursuant to the Agency Agreement, Facer solicited proposals and PIC wrote contracts of insurance for which premiums were collected and forwarded to PIC, net of the agents commissions.

During the life of the agreement, prior

to July 30, 1981, when policies were cancelled, Facer refunded directly to the insureds its unearned commissions.

Each month PIC invoiced the defendant for some, but not necessarily all, of the policies written prior to the date of the invoice. The defendant would pay some, but not necessarily, all of the invoiced charges.

On July 30, 1981, the plaintiff's predecessors in office were appointed conservator of PIC by the Court of Common Pleas of Franklin County, Ohio, to oversee the liquidation of PIC. Thereafter the liquidator notified agents, including Facer, that all agency contracts were cancelled.

As of July 30, 1981, PIC had written policies of insurance for which $20,453.47 in premiums had not been remitted to PIC. As of this date, $3,609.75 of the total $20,453.47 premiums had been earned and only $2,720.31 had been collected by the

defendant, Facer.

Defendant Facer had exercised ordinary care as PIC's agent in the billing and collecting of premiums from PIC policyholders prior to July 30, 1981. The defendant, Facer, remitted neither the premiums earned or the premiums collected as of July 30, 1981.

By reason of the insolvency and liquidation of PIC, all of the insurance policies procured by Facer for PIC were cancelled between July 30, 1981 and September 4, 1981. The plaintiff, or his predecessors, computed unearned premium credits on all PIC policies as though the entire premium had been (or would be) paid. Then, the plaintiff, or his predecessors, issued and delivered credit memoranda to policyholders which were to be used by policyholders to file claims in the insolvency proceedings.

Shortly after July 30, 1981, Facer and the liquidator each advised all PIC insureds of the insolvency and liquidations of PIC. Facer expended $72,813.00 in an attempt to make its PIC policyholders whole. Facer thereby induced its PIC policyholders to remit the net earned premium portion of the theretofore unpaid PIC premiums and, also, assign their Illinois and Indiana Guaranty Fund Claims to Facer from which Facer reduced its losses to $29,516.56.

Thereafter, the plaintiff, or his predecessors, invoiced the plaintiff for the entire unearned, uncollected premiums of $20,453.47. In March, 1982, the plaintiff's predecessor invoiced the defendant for the unearned commissions on all PIC policies including those policies for which no premiums had ever been paid by policyholders.

The defendant responded that it would pay the plaintiff the net earned premiums but no more. The defendant further responded that all unearned commissions, had, as the Agency Agreement required, been refunded directly to the policyholders.

BASIS FOR FEDERAL JURISDICTION
IN COURT OF FIRST INSTANCE

The plaintiff, liquidator of an Ohio Insurance Corporation, filed his complaint in the Central District of Illinois seeking monetary damages from the defendant, a Delaware Corporation, in a sum exceeding $30,000.00

The District Court of the United States have original jurisdiction in cases where there is a complete diversity of citizenship between the parties and the amount in controversy exceeds $10,000.00. 18 U.S.C. Sec. 1332.

REASONS FOR GRANTING THE WRIT

The decision of the Federal Court of Appeals misconstrues 1981 Ill. Rev. Stat. ch. 73, par. 818 and in so doing overturns a prior decision of that court and a decision of the Supreme Court of Illinois.

Historically, the Illinois Supreme Court has upheld the right of the policyholder to withhold payment of premiums upon the insolvency of an insurance company. In Farmer and Merchants Insurance Company v. Smith, 63 Ill. 187. (1872) the receivers of an insolvent fire insurance company filed suit against a policyholder to recover on a promissory note given for the payment of premiums on the policy. The company became insolvent during the second year of a five-year policy with this customer. The receiver sought payment for the unearned premiums. The Supreme Court held,

> ". . . when the company failed, or course all obligation to continue the payment of these notes from year to year terminated.
>
> We do not understand on what ground a bankrupt company can continue to claim an annual payment for protection against fire which it does not pretend to be able to furnish." Farmers and Merchants Supra at 189.

Two years later, the Supreme Court extended this principle to a slightly different fact situation. In Smith v. Binder, 75 Ill. 492, (1874) a policy of insurance had been issued to an insured who, in turn, remitted the premium for same to an agent of the insurance company. Before the agent had accounted to the company, the company became insolvent. The insured sued the agent for the return of the premium. The Supreme Court reasoned first that there was no theory upon which the company could maintain an action to recover the money from the insured or the agent, the consideration for which the

premium was paid having failed. Having so found, the Court held that the insured could recover unearned premiums in the possession of the agent of the insured at the date of liquidation. Smith v. Binder Supra at 495.

Query, could an agent be required to pay the premiums it had received to plaintiff after receiving notice of the insolvency without also subjecting itself to liability to the policyholders for same? In 1960, the Seventh Circuit answered this question in the negative.

In 1960, the Seventh Circuit applied Illinois law in a suit brought by the liquidator of an insolvent New York insurance company against an Illinois agent for unearned premiums collected by the agent prior to the insolvency. The Court first noted the Illinois Supreme authorities of Farmers and Merchants and Smith

v. Binder. The Court refused to distinguish the Smith case, because in Smith the case was brought by the policyholders. It then ruled since the policyholder could have recovered the premiums from the agent, the agent should not be held liable to the liquidator of the insurance company. Holz v. Smullen, 277 F 2d 58, (7th Cir. 1960).

Thus, not only could the agent not enforce payment of premiums by policyholders, it was required to return at least the unearned portion of collected premiums to the policyholders. If this rule applies to premiums collected prior to the date of insolvency, it no doubt applies to premiums collected after the insolvency date.

The same statute held by the Court below to be dispositive of this case has always upheld the right of policyholders

to withhold payment of unearned premiums upon the insolvency of an insurance company. Ill. Rev. Stat. Chapter 73, Section 818 has provided in relevant part since 1937 as follows:

> "In all cases of mutual debts or mutual credits between the (insolvent) company and another person, such credits and debts shall be set off or counterclaimed and the balance only shall be allowed or paid, . . ."

Thus, policyholders who have been billed for the next year's premiums, most of which are unearned by the date of insolvency, may offset that unearned portion against the entire premium and be liable for no more than the earned premium. The agent cannot compel payment of more than the net earned premium. Nor, then, can it be required to pay more.

The 1967 amendment sought only to circumscribe the agent's set-off rights vis a vis the insurer. The amendment did

not affect the rights of the policyholder vis a vis the agent or insurer. Thus, to require the agent to pay premiums it can not collect from the policyholder requires a finding that the agent is independently liable for their payment. Such a finding ignores the plain language of the Agency Agreement, not to mention the general principles of the law of agency.

In this case, the holding of the Seventh Circuit Court of Appeals overlooks (and fails to mention) its own decision and those of the Illinois Supreme Court.

Additionally, the issue of an agent's liability for unearned premiums in the event of an insurer's insolvency remains debated by the various states. Several side with the decision of the court herein, (See e.g., Ratchford v. United States Central, 492 F. Supp. 137 (E.D. Mo. 1980);

Trimble v. Coppage, 256 Md. 176, 269 A. 2d 563 (1970); Shoup v. Mayerson, 454 P. 2d 666 (Okl. 1969); while others resolve the issue in favor of the agent (See e.g., Bushnell v. Kraft, 183 N.E. 2d, 340, 345 (App. Ct. Ind. 1962); Superior Mutual Insurance Co. v. E-Z Pay Plan, Inc., 247 Or. 170, 428 P. 2d 172 (1967); Bohlinger v. Zanger, 306 N.Y. 228, 117 N.E. 2d 338 (1954); Hershey v. Kennedy and Ely Ins., Inc., 294 F. Supp. 554 (S.D. Fla. 1967).

Petitioner acknowledges that this Court rarely reviews challenges to State law determinations by Court of Appeals, (Haring v. Prosise, 1983, 103 S. Ct. 2368, 2373 N. 8, 462 U.S. 306, 76 L. Ed. 2d 595. Yet, the principles to be resolved herein are of such sweeping public impact that this Court should acknowledge the significance of the issues and grant certiorari.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 84-2326

GEORGE FABE, Superintendent of Insurance, State of Ohio, Columbus, Ohio, Liquidator of Proprietors' Insurance Company (an Ohio Corporation),

Plaintiff-Appellee,

v.

FACER INSURANCE AGENCY, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Central District of Illinois, Danville Division.
No. 83-2101
Harold A. Baker, Judge

Argued April 22, 1985
Decided September 9, 1985

Before ESCHBACH and POSNER, Circuit Judges, and GIBSON, Senior Circuit Judge.*

GIBSON, Senior Cirucit Judge. Facer Insurance Agency, Inc. (Facer) appeals from the district court's[1] order granting summary judgment to the plaintiff George Fabe (Fabe). Fabe is the Superintendent of Insurance of the State of Ohio, and appears here as liquidator of Proprietors' Insurance Company (PIC), an Ohio corporation with its principal place of business in Ohio. Fabe brought this diversity action seeking to recover premiums and commissions from Facer, a Delaware corporation with its principal place of business in Illinois. Both Fabe and Facer agree that Illinois law controls. We affirm the district court's grant of summary judgment.

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* The Honorable Floyd R. Gibson, Senior Judge for the Eighth Circuit, sitting by designation.

1 The Honorable Harold A. Baker, Chief Judge for the United States District for the Central District of Illinois.

I. FACTS

Until 1981, PIC was in the business of insuring against aviation risks. On January 17, 1980, PIC and Facer entered an Agency Agreement, which was executed and performed in Illinois. By the terms of this contract, Facer was appointed PIC's agent for procuring applications for aviation insurance in Illinois, and for collecting and receiving premiums for such insurance. The Agency Agreement read in relevant part:

> 1. The Agent may collect, receive, and receipt premiums on insurance proposals tendered to and accepted by the Company, and may hold such premiums as a trustee, separate and apart from all the other moneys belonging to the agent and retain out of premiums so collected, as full compensation for business placed with the company, commissions* * *.
> The Agent's account on the Company's books evidencing a debtor-creditor account is deemed merely a record of business transacted. Neither the keeping of an account in such form, nor the rendering of same, nor failure to enforce prompt remit-

tance, nor alteration in compensation rate, nor compromise or settlement shall be considered waiver of the trust relationship as to premiums collected by the Agent.

2. Money due the Company on business placed by the Agent with the Company hsall be paid in full no later than forty-five (45) days following the end of the month in which policies become effective.

* * * *

If the Company shall return or refund to any insured the whole or any part of premiums from which the Agent has retained commissions and/or charges, the Agent shall promptly repay to such insured the same proportionate part of retained commissions and/or charges.

After issuance by the Company of any contract of insurance directly to an insured, the Agent shall be liable to the Company for the earned premium on each policy or binder of insurance solicited and written through the Agent, whether the same shall have been collected or not.

Pursuant to this agreement, Facer solicited proposals and PIC wrote insurance contracts, for which Facer collected and forwarded premiums and retained commissions. On July 30, 1981, Robert L. Ratchford, Jr.,

then Superintendent of Insurance of the State of Ohio, was appointed Conservator of PIC by the Court of Common Pleas of Franklin County, Ohio, to oversee the liquidation of PIC.[2] Ratchford as liquidator notified Facer between July 30 and September 4, 1981, that all of the insurance policies procured by Facer for PIC were cancelled due to PIC's liquidation.

PIC's records show that as of July 30, 1981, Facer owed PIC $20,453.47 on account as total premiums, both earned and unearned, for insurance policies procured through Facer. As of that date, $3,609.75 of the total $20,453.47 premiums had been earned. On January 31, 1982, Facer's commissions on unearned premiums, resulting from the

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[2] Ratchford was succeeded as Superintendent of Insurance and as liquidator of PIC by Robert H. Katz on September 3, 1982. George Fabe, the plaintiff here, replaced Katz as Superintendent and as liquidator on February 25, 1983.

cancellation of the PIC policies, totalled $9,580.75. Fabe claims that Facer is liable for all of the premiums due on July 30, regardless of whether the policies were subsequently cancelled, or whether the premiums had actually become earned prior to that date. Fabe also contends that Facer must seek its remedy for any offset for unearned commissions as a general creditor of PIC in the Ohio liquidation proceedings.

In response, Facer asserts that it is not liable to PIC for unearned premiums, because the insolvency of PIC and the cancellation of the policies relieved Facer of its contractual responsibility to forward premiums. Further, Facer states that it had already refunded all unearned commissions to the cancelled policyholders, as it contends was required by the Agency Agreement. When Facer

informed Fabe of its intention to pay only earned premiums, Fabe brought this action in the distirct court. The court granted Fabe's motion for summary judgment in Fabe v. Facer Insurance Agency, Inc., 588 F. Supp. 1330 (C.D. Ill. 1984). The court held that the Illinois statute governing the rights of agents to set-offs against insurance companies in the process of liquidation rendered the agent Facer liable for the entire premiums due on PIC policies written (and still in effect) by Facer prior to the court-ordered liquidation on July 30, 1981.

II. PROPRIETY OF GRANT OF SUMMARY JUDGMENT

Facer raises many issues on appeal, but the crux of its argument is that the terms of the Agency Agreement, rather than the Illinois statutory scheme, control the dispute. Facer contends that under

that agreement it is liable only for that portion of the premiums that was earned prior to the cancellation of the policies. We agree with the district court, however, that the Illinois statutory liquidation procedure expressly governs this case. Ill. Rev. Stat. Ch. 73 § 818 (1981) provides.

> No set-off shall be allowed in favor of an insurance agent or broker against his account with the company, for the unearned portion of the premium on any cancelled policy, unless that policy was cancelled prior to the entry of the Order of Liquidation or Rehabilitation, and unless the unearned portion of the premium on that cancelled policy was refunded or credited to the assured or his representative prior to the entry of the Order of Liquidation or Rehabilitation.

Under the statute, then, because the policies in question were cancelled <u>after</u> the court-ordered liquidation, Facer owes Fabe for the entire premiums due on PIC policies written by Facer prior to July 30,1981, the date liquidation was ordered.

The statute represents the legislative plan for marshalling the assets of insolvent insurance companies to assure fair distribution.

Facer argues that the liquidation statute does not apply because it is not seeking a set-off for unearned premiums, as it contends that it never was obligated to PIC for unearned premiums. As the district court noted, however, the Agency Agreement required that Facer as agent pay PIC the full premiums for policies it procured within forty-five days of the end of the month in which the policies became effective. Further, the course of dealing between the parties demonstrates that Facer consistently paid PIC the total premiums for policies it procured when PIC invoiced Facer, regardless of whether the premiums had been earned or collected. Facer maintains that holding it responsible

to Fabe for uncollected premiums amounts to the impermissible creation of independent liability on the part of Facer to pay the premiums. Facer, however, chose to extend credit to the policyholders; an agent's extension of credit to policyholders does not affect its liability to pay the premiums. See Ratchford v. United States Central Underwriters Agency, Inc., 492 F. Supp. 137, 139 (E.D. Mo. 1980). And as the district court pointed out, the final sentence of paragraph 2 of the Agency Agreement evinces the parties' intention that if Facer were to extend credit to policyholders, it would remain responsible to PIC whether or not it collected from the policyholders.

As for the unearned commissions in dispute here, because they were retained by Facer from premiums on policies cancelled subsequent to the date of liquidation, Ill.

Rev. Stat. ch. 73, § 818 operates to make Facer liable for these commissions as well. Contrary to Facer's contention, it had no right to refund theunearned commissions after the Order of Liquidation. The mailgram sent to Facer on July 30, 1981, by Robert L. Ratchford, the original court-appointed conservator of PIC, expressly revoked Facer's authority to refund or credit its policyholders any unearned premiums, and stated that any such refunds would be made at Facer's own expense. See Cork v. Associated International Insurance Managers, Inc., 58 Ill. App. 2d 331, ____, 208 N.E. 2d 4,8 (1st Dist. 1965) (notice of liquidation revoked authority, granted in agreement between the parties, to make withdrawals from bank account). In sum, because no issue of fact exists and under Illinois law Facer is liable to Fabe for the total premiums, including the unearned commissions, on the cancelled policies.

the district court properly granted Fabe's motion for summary judgment.

III. PREJUDGMENT INTEREST

Facer also contends that the district court erred in awarding Fabe prejudgment interest on his claims. The Illinois Interest Act, Ill. Rev. Stat. Ch. 17, § 6402 (1983), provides in relevant part that "creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing* * *." Facer argues that under the principle of ejusdem generis, the general term "instrument of writing" should be interpreted to mean writings of the same nature as bills, bonds, and promissory notes; that is, writings creating an indebtedness. The Agency Agreement, Facer contends, does not fit this category. Facer also claims

that prejudgment interest was improperly awarded here because the amount Fabe alleges to be due is not liquidated, as a bona fide difference of opinion existed between the parties as to the amount due.

We hold that the district court's award of prejudgment interest to Fabe was appropriate. The Agency Agreement is an instrument in writing within the meaning of the Interest Act. A written contract is a "written instrument" within that statute if it contains some price provisions so that the amount due under the contract will be fixed or determinable, and as long as it is due in the sense that a debtor-creditor relationship has come into being. Servbest Foods, Inc. v. Emessee Industries, Inc., 82 Ill. App. 3d 662, ____, 403 N.E. 2d 1, 13 (1st Dist. 1980). Under the Agency Agreement, once Facer placed business for PIC, it became contractually liable for the

whole premiums. Also, insurance policies have been held to be instruments in writing within the Interest Act, with interest computed from the date payment becomes due under the policy. See, e.g., Conway v. Country Casualty Insurance Co., 97 Ill. App. 3d 768, ____, 423 N.E. 2d 559, 565-66 (3d Dist. 1981), rev'd in part on other grounds, 92 Ill. 2d 388, 442 N.E. 2d 245 (Ill. 1982); Central National Chicago Corp. v. Lumbermen's Mutual Casualty Co., 45 Ill. App. 3d 401, ____, 359 N.E. 2d 797, 802 (1st Dist. 1977). The Agency Agreement together with the insurance policies Facer wrote for PIC, then, constitute an instrument in writing that establishes a fixed amount due the amount of the premium.

Facer's contention that the "bona fide difference of opinion" that existed between Facer and Fabe as to the amount due renders the award of prejudgment interest inappro-

priate is without merit. A court may award prejudgment interest even though a good faith defense exists, and even when the claimed right and the amount due require judicial ascertainment. See, e.g., LaGrange Metal Products v. Pettibone Mulliken Corp., 106 Ill. App. 3d 1046, ____, 436 N.E. 2d 645, 652 (1st Dist. 1982); E. M. Melahn Construction Co. v. Village of Carpentersville, 100 Ill. App. 3d 544 ____, 427 N.E. 2d 181, 186-7 (2d Dist. 1981); Servbest Foods, 82 Ill. App. 3d at ____, 403 N.E. 2d at 13; Haas v. Cravatta, 71 Ill. App. 3d 325, ____, 389 N.E. 2d 226, 230-31 (2d Dist. 1979). At the heart of the dispute here was Facer's liability for unearned and uncollected premiums; once the district court determined that Facer owed the entire premiums on the cancelled policies, the amount due was easily determinable. Facer has never questioned the calculations as to what the total premiums on policies

procured by Facer amounted to on July 30, 1981.

IV. CONCLUSION

The district court's order granting summary judgment and prejudgment interest to Fabe is affirmed. Costs assessed against defendant.

A true Copy:
Teste:

Clerk of the United States of Appeals for the Seventh Circuit

App. 17

(Filed July 20, 1984)

No. 83-2101

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

GEORGE FABE, Superintendent of Insurance, State of Ohio Columbus, Ohio, Liquidator of Proprietors' Insurance Company (an Ohio Corporation), 7991 Columbus Pike, Delaware, Ohio 43014,

Plaintiff,

vs.

FACER INSURANCE AGENCY, INC. 341 S. Century, Rantoul, Illinois, 61866,

Defendant.

ORDER GRANTING SUMMARY JUDGMENT

In this diversity action, the Plaintiff, George Fabe (Fabe), Superintendent of Insurance of the State of Ohio, as liquidator of Proprietors' Insurance Company, an Ohio Corporation, with its principal place of business in Delaware, Ohio (P.I.C.), seeks to recover premiums and commissions from the defendant, Facer Insurance Agency,

Inc., a Delaware Corporation, with its principal place of business in Rantoul, Illinois (Facer). More than $10,000 exclusive of interest and costs is at issue. See 28 U.S.C. § 1332. The material facts in the case are not in dispute and each party has moved for summary judgment. See Fed. R. Civ. P. 56.

I.

P.I.C. was in the business of insuring against risks associated with aviation and, as "the Company", on January 17, 1980, entered into an Agency Agreement in writing with Facer as "the Agent." That contract provided generally that the agent was to procure proposals for contracts of insurance covering risks that the Company lawfully could insure against. As they apply to this case, the pertinent parts of the Agency Agreement are that:

The agent may collect, receive, and receipt premiums on insurance proposals tendered to and accepted by the Company, and may hold such premiums as a trustee, separate and apart from all the other moneys belonging to the Agent and retain out of premiums so collected, as full compensation for business placed with the company, commissions . . . .

. . . .

Money due the Company on business placed by the Agent with the Company shall be paid in full no later than forty-five (45) days following the end of the month in which policies become effective.

. . . .

If the Company shall return or refund to any insured the whole or any part of premiums from which the Agent has retained commissions and/or charges, the Agent shall promptly repay to such insured the same proportionate part of retained commissions and/or charges.

After issuance by the Company of any contract of insurance directly to an insured, the Agent shall be liable to the Company for the earned premium on each policy or binder of insurance solicited and written through the Agent, whether the same shall have been collected or not.

Pursuant to the Agency Agreement, Facer solicited proposals, and P.I.C. wrote contracts of insurance for which premiums were collected and forwarded and commissions retained. Then, on July 30, 1981, Fabe's predecessors in office were appointed Conservator of P.I.C. by the Court of Common Pleas of Franklin County, Ohio, to oversee the rehabilitation or liquidation of P.I.C.

The Ohio Court enjoined:

> . . . all persons having claims against the Defendant (P.I.C.) from instituting or continuing any action; other than in this liquidation proceeding, which would (1) interfere . . . with the possession, control, title, rights, or interests of the liquidator . . . (2) tend to give rise to a . . . preference, judgment, attachment, lien or the making of a levy against the Defendant (P.I.C.) or its property or assets subject to the liquidator's control.

At various times between July 30, 1981, and September 4, 1981, all of the policies of insurance procured by Facer for P.I.C. were cancelled by Fabe, or his predecessors,

acting under orders of the Ohio courts. On July 30, 1981, P.I.C.'s records show and Facer admits, that there was $20,453.47 due on account to P.I.C. from Facer as total premiums, both earned and unearned, for policies of insurance procured by Facer. There is also no dispute that on January 31, 1982, $9,580.75 was the amount of Facer's commissions on unearned premiums resulting from the cancellation of the P.I.C. policies written by Facer.

Fabe claims that Facer is liable for all the premiums due on July 30, 1981, without regard to whether the policies on which the premiums were due were subsequently cancelled and irrespective of whether the premiums became unearned premiums. It is also Fabe's position that Facer must seek its remedy for any offset for unearned commissions in the Ohio liquidation proceedings and, for that pur-

pose, Facer must take its place as a general creditor of P.I.C.

Facer, on the other hand, contends that it is not liable to P.I.C. for unearned premiums and that the insolvency of P.I.C. and the cancellation of the policies, relieved Facer of its responsibility to forward premiums. As to the unearned commissions, Facer says it credited the cancelled policyholders for the amounts of those commissions when Facer wrote new policies to take the place of the cancelled P.I.C. policies. Facer asserts that the commissions rightfully belonged to the policyholders and not to P.I.C. and that Facer, therefore, returned the commissions to the policyholders.

Facer argues, and Fabe does not contest, that the law of Illinois is applicable to this case. See Klaxon Company v. Stentor Electric Manufacturing Company, 313 U.S.

487 (1941). "Under traditional Illinois conflict of law principals, the validity, construction and obligation of a contract are determined by the law of the place where it is made and performed." (Footnote omitted.) Zlotnick v. MacArthur, 550 F. Supp. 371, 373 (N.D. Ill. 1982), citing Walker v. Lovitt, 250 Ill. 543, 95 N.E. 631 (1911).[1]

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[1] The Zlotnick court and other courts have commented that Illinois choice of law rules in contract actions have not yet adopted the "most significant contacts" approach but still look in a somewhat mechanistic way to the respective places of execution and performance." Zlotnick, 550 F. Supp. at 373 n.2; N I I Nettles Services, Inc. v. ICM Steele Corp., 514 F. Supp. 164 (N.D. Ill. 1981); Champagne v. W.E. O'Neil Construction Co., 77 Ill. App. 3d 136, 395 N.E.2d 990 (1979); Cook Associates, Inc. v. Colonial Broach & Machine Co., 14 Ill. App.3d 965, 304 N.E.2d 27 (1973). However, it is not necessary to determine whether the Illinois choice of law rules would refer to Illinois law or Ohio law because, whatever law applies, the same result would obtain.

II.

The crux of the dispute between Facer and Fabe lies in whether the terms of the Agency Agreement between P.I.C. and Facer control the economic relations of the parties or whether the statutory procedure for liquidation of an insolvent insurance company governs the case. Is this a case of interpretation of contract rights or a case of enforcing the statutory liquidation procedures for defunct insurance companies? It is apparent that the case is of the latter variety.

Illinois would certainly give full faith and credit to the Ohio Court's orders governing the liquidation of P.I.C. since there is nothing in the Ohio proceedings which is contrary to Illinois policy. People ex rel. Ickes v. Rushworth, 294 Ill. 455, 128 N.E. 555 (1920); Mell v. Goodbody & Co., 10 Ill. App.3d 809, 295 N.E.2d 97

(1973).

III.

Turning first to the question of the claim for premiums, the Illinois statute governing the rights of agents to set-offs or counterclaims against insurance companies in the process of liquidation is clear.

> No set-off shall be allowed in favor of an insurance agent or broker against his account with the company, for the unearned portion of the premium on any cancelled policy, unless that policy was cancelled prior to the entry of the Order of Liquidation or Rehabilitation, and unless the unearned portion of the premium on that cancelled policy was refunded or credited to the assured or his representative prior to the entry of the Order of Liquidation or Rehabilitation.

Ill. Rev. Stat. ch. 73, Par. 818 (1981).

The plain meaning of the statute is that Facer owes Fabe for the premiums due on P.I.C. policies written by Facer prior to July 30, 1981, the date on which the Ohio Courts ordered the liquidating of P.I.C. The venerable cases of Farmer and

Merchants Insurance Company v. Smith, 63 Ill. 187 (1872) and Smith v. Binder, 75 Ill. 492 (1874) do not support Facer's case, nor does Holz v. Smullan, 277 F.2d 58 (7th Cir. 1960). The cases are decisions prior to the 1967 enactment of Ill. Rev. Stat. ch. 73, Par. 818 and are not consonant with the legislative statement of public policy regarding liquidations of insolvent insurance companies. Facer must look to the Ohio proceedings for the satisfaction of any claims against P.I.C. See Ratchford v. U.S. Central Underwriters Agency, 492 F. Supp. 137 (E.D. Mo. 1980).

Facer's argument that, under the terms of the Agency Agreement, only earned premiums were required to be paid is without merit. The agreement plainly states that "money due the Company on business placed by the Agent with the Company shall be

paid in full no later than forty-five (45) days following the end of the month in which the policies become effective." The last sentence of paragraph 2 of the Agreement does not relieve the Agent of the duty to remit premiums within 45 days. It merely makes clear that if the Agent extends credit to the insured, the Agent is still responsible to the Company whether or not he collects from the insured.

IV.

The unearned commissions retained by Facer were on premiums that Facer had collected from policyholders and forwarded to P.I.C. The policies were all cancelled subsequent to July 30, 1981, the date of liquidation, and under Ill. Rev. Stat. ch. 73, Par. 818 (1981) Facer has no right of set-off. The same rationale that makes Facer liable for the premiums makes it liable for the unearned commissions.

V.

Facer claims damages for P.I.C.'s breach of the Agency Agreement. The claim is frivolous and does not merit discussion. No claim for damages can be made for breach of agreement where the breach is occasioned by court supervised liquidation. Facer's remedy is in the liquidation proceeding. O'Hern v. DeLong, 298 Ill. App. 375, 19 N.E.2d 215 (1939).

VI.

Fabe claims prejudgment interest and is entitled to recover it. Ill. Rev. Stat. ch. 17, Par. 6402 (1981) provides:

> Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing . . . .

The amounts owed under the agreement were subject to ready calculation and the fact that Facer defends "in good faith" does

not obviate Fabe's right to receive pre-judgment interest. KFK Corp. v. American Continental Homes, Inc., 71 Ill. App.3d 325, 389 N.E.2d 226 (1979).

VII.

Finally, some mention should be made of the inconsistency of Facer arguing in this case that it should not be required to pay its obligations to P.I.C. in the Ohio liquidation proceeding and yet the briefs and the discovery reveal that Facer has made claims against the Illinois and Indiana Insurance Guaranty Funds on cancelled P.I.C. policies. Facer apparently too assignments from P.I.C. policyholders. See generally Ill. Rev. Stat. ch. 73, Par. 1065.82 et seq. (1981). Facer also has made claims in the Ohio liquidation proceedings for refunds from P.I.C. policies written in Wisconsin.

The rationale for creating the statutory procedures for liquidation of insurance companies is to provide a means of marshaling the insolvent companies assets and distributing them under court supervision. Avoiding preference of creditors is an aim of liquidation just as it is in federal bankruptcy. The guaranty funds maintained by the various states and the contributions required from solvent insurance companies provide a means of ameliorating the financial impact on individual policyholders and spreading the losses caused by insolvency across the insurance industry. To allow Facer to avoid liability to the Ohio liquidator in this court would counter to the whole public policy underlying the liquidation process.

IT IS THEREFORE ORDERED that the Clerk enter judgment in favor of the plaintiff, George Fabe, Superintendent of Insurance,

State of Ohio, as Liquidator of Proprietors' Insurance Company, and against the Defendant, Facer Insurance Agency, Inc., in the sum of $34,173.44 and costs of suit.[2]

ENTER this 20th day of July, 1984.

/s/ Harold A. Baker

United States District Judge

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[2] The judgment is broken down as follows:

a. Sum due on Count I	$20,453.47
b. Pre-judgment interest due on Count I from 8/20/81 (1075 days at 2.80)	3,010.00
c. Sum due on Count II	9,580.75
d. Pre-judgment interest due on Count II from 3/10/82 (862 days at 1.31)	1,129.22
	$34,173.44

85-1000

No. _____

Supreme Court, U.S.
FILED
JAN 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

FACER INSURANCE AGENCY, INC.,

Petitioner,

v.

GEORGE FABE, Superintendent of Insurance, State of Ohio, Columbus, Ohio, Liquidator of Proprietors' Insurance Company (an Ohio Corporation), 7991 Columbus Pike, Delaware, Ohio 43014

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent respectfully prays that a writ of certiorari be denied and the judgment and opinion of the Seventh Circuit entered in this proceeding on September 9, 1985 be permitted to stand without review.

REASONS FOR DENYING THE WRIT

No substantial ground for review on writ of certiorari exists. The fact Petitioner disagrees with the decision and its reasoning is not sufficient grounds for review. The various decisions of the Federal Courts of Appeals are not in conflict. The cases reach different results based on different state laws and different factual situations. The relevant Illinois Statute, in particular, is unique (Ill. Rev. Stat. Ch. 73 §818 (1981). Few, if any, other state statutes specifically deny a set off to an insurance agent against his account with a company, for the unearned portion of the premium from a cancelled policy, unless that policy was cancelled prior to the entry of the Order of Liquidation or Rehabilitation, and unless the unearned portion of the

premium on that cancelled policy was refunded to the assured prior to the entry of Order of Liquidation or Rehabilitation. A number of states reached this conclusion based on their common law, but Illinois is unique in codifying this approach.

The decision involves no questions of federal law.

The decision in no way departs from the accepted and usual course of judicial proceedings, nor does it sanction such a departure by a lower court. Petitioner claims the decision overturns a 1960 Seventh Circuit Decision and 1872 and 1874 decisions by the Illinois Supreme Court. Petitioner neglects to mention that these cases predate the relevant Illinois statute, which was adopted in 1967, and which was found by both the Seventh Circuit Court of

Appeals and Distric Court to be controlling. The issues, while obviously important to the litigants, and to others similarly situated; namely insurance agents and the liquidators of insolvent insurers, cannot be said to be of "sweeping public inpact" as Petitioner alleges. The decision in no way affects the rights of policy holders, but only affects the rights of Illinois insurance agents against the liquidator of an insolvent insurer. The right and fair result was reached below. The rule sought by Petitioner would run counter to the whole public policy underlying the Illinois statutory liquidation process for insolvent insurers. This statutory process is designed to achieve an equal sharing by creditors in the insolvent's assets, in proportion to their claims, without permitting preferential

set offs in favor of some agents over other agents and creditors. The rule advocated by Petitioner would in fact enable tardy or defaulting agents to recover more than those agents who promptly collect and pay premiums. The Illinois statute is designed to put all creditors on an equal footing.

In addition, Petitioner is refusing to account to the insurer for the same funds it claimed a refund for, causing the insurer to suffer a double loss. Petitioner filed and was paid claims against the Illinois and Indiana Insurance Guaranty Funds for the same funds it claims it is not liable for to respondent. The Respondent suffers a double loss in that these Guaranty Funds have a claim against it in the context of the liquidation proceedings in Ohio, but they have not received the funds from the Petitioner. Petitioner in fact has

received the funds twice. Also, Petitioner claims the right to keep the profit on cancelled policies. Crediting unearned commissions against replacement premiums simply means that Petitioner did not take a double commission; it collected only one commission instead of two.

Certain essential facts are mistated or omitted by Petitioner which change the nature of the legal issues. Petitioner states that each month, PIC invoiced it for some, but not necessarily all, of the policies written prior to the date of the invoice; and that each month, Facer would pay some, but not necessarily all, of the invoiced charges. This incorrectly implies that PIC only billed and Facer only paid earned or collected premiums. The consistent course of dealing between the parties was that Facer paid PIC the total premiums for

policies it procured when PIC invoiced Facer, regardless of when the premiums had been earned or collected. If Facer paid less than the invoiced amount, it was because the account current did not yet reflect a recent Facer payment. Also, PIC invoiced Facer for premiums when the final policy was issued, although a binder was sometimes issued and the policy effective in an earlier month. This occurred when Facer was late in forwarding a signed application, necessary before the final policy could be issued.

Facer's statement of facts also fails to mention that on July 30, 1981, the liquidator sent Facer a mailgram notice of PIC's insolvency, instructing it to collect and pay all balances due as of July 30, 1981, that no refund of unearned premiums should be paid or credited to any policyholder on

policy transactions occurring on or after July 30th, and that if any agent made such a refund he did so at his own expense. The mailgram specifically advised agents that they would not be allowed to off set premium refunds on policy transactions occurring after July 30th, against balances owed PIC prior to July 30th. Almost immediately Facer began sending cancellation notices to PIC with letters stating "We are applying [the unearned premium] to our account with you." None of the unearned commissions awarded by the Courts are on policies cancelled before entry of the Order of Liquidation. In no case did Facer give the policyholder credit for the unearned commission before July 30th.

CONCLUSION

For the foregoing reasons, no Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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